In the Supreme Court of the United States

OCTOBER TERM, 1923

THE FERRIES COMPANY, APPELLANT,
v.
THE UNITED STATES OF AMERICA } No. 298

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

The Ferries Company has appealed to this Court from a judgment of the Court of Claims which dismissed its petition for want of jurisdiction.

On March 31, 1909, the City of Portsmouth and the County of Norfolk, Virginia, owners of the properties known as the Norfolk County Ferries, leased the same for a period of ten years beginning April 1, 1909, to R. E. Jordan, who assigned his rights as lessee to The Ferries Company, a Virginia corporation. (R. 24–25.) The lease provided that the properties should be taken over by the lessee at the valuation fixed by a board of appraisers appointed

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under the then existing lease, and that a similar appraisal should be made at the conclusion of the term. If the value at the end exceeded that at the beginning, the owners were obligated to pay the difference to the lessee; and if it were less, the difference was to be paid by the lessee to the owners. (R. 24–25.)

This lease was terminated prior to the expiration of its term, and the operation of the ferries was taken over on November 1, 1918, by the Bureau of Industrial Housing and Transportation of the Department of Labor of the United States, under a tripartite agreement, to which the owners, the City of Portsmouth and County of Norfolk, were of the first part, the Ferries Company, lessees, of the second part, and the said Bureau, of the third part. (R. 25). That contract, which was dated October 8, 1918, contained among others, the following provisions (Finding No. IV, R. 25):

> Now, therefore, in consideration of the mutual promises and covenants in this agreement contained, it is agreed by and between the parties hereto, as follows:
>
> First. That by and with the mutual consent of the parties of the first and second parts, hereto, the said lease of the Norfolk County Ferries, executed by the City of Portsmouth and by the County of Norfolk, and now held by the Ferries Company, dated March 31, 1909, shall terminate as of the time that the Bureau shall take over the operation of said ferries, in the same manner and to the same effect as if such time

had been originally fixed in said lease as the time for the termination thereof.

Second. That the appraisal of the ferries properties so provided for in said lease, shall take place as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease, as therein provided, and *said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau,* as aforesaid.

Third. That should any money be due the Ferries Company by the City of Portsmouth and the County of Norfolk, *as a result of the said appraisal mentioned above, then such amount shall be paid* to the Ferries Company by the Bureau and charged by it to the City of Portsmouth and the County of Norfolk, as provided under the agreement with them, of even date herewith; and *if any moneys shall be due* the City of Portsmouth and the County of Norfolk by the Ferries Company *as a result of said appraisal, then the Ferries Company shall pay such amount* to the Bureau instead of paying the same to the City of Portsmouth and the County of Norfolk, and the Bureau shall credit the City of Portsmouth and the County of Norfolk herewith, as provided in its agreement with them of even date herewith. (Italics ours.)

The properties having been taken over by the Bureau, a board of appraisers was selected. W. W. Colonna and J. M. Emery were chosen by The Ferries Company, J. Wiley Halstead by the City of

Portsmouth, Charles F. Harper by the County of Norfolk, and Cornelius Thomas by the four first chosen. (Finding No. VI, R. 26.) None of the appraisers were selected by the Bureau, the succeeding lessee, although the contract of October 8, 1918, provided that "said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau" (Finding No. IV, R. 25–26), and the original lease of March 31, 1909, had provided that one should be chosen "by the succeeding lessee, should there be a succeeding lessee," and "should there be no succeeding lessee then two shall be chosen by the lessee" (Finding No. III, R. 24–25).

After making extensive inquiries and hearing much testimony as to the value of the properties to be appraised, three members of the Board, Harper, Halstead, and Thomas, concurred in a report which fixed the value as of October 31, 1918, at $164,928.68, which valuation, with minor exceptions, was based upon pre-war conditions and values. (Finding No. VIII, R. 27.) The remaining two members of the Board, Colonna and Emery, declined to concur in the report because, as they said, it was not based upon values as they existed on October 31, 1918. (Finding No. VII, R. 26.) The value of the properties upon a "war-basis," as found by the Court of Claims, was $289,575.80 (Finding No. VIII, R. 27), and the value on April 1, 1909, when the properties were acquired by the Ferries Company, was $152,274.40 (Finding No. VIII, R. 27).

If the Ferries Company had accepted the appraisal made by a majority of the Board, had made demand upon the United States for payment of the difference between $164,928.68, and $152,274.40, or $12,654.28, and such demand had been refused; and if it had then brought its action in the Court of Claims for the recovery of that amount, a question of liability would have been presented which does not arise upon the record now before this Court. No such claim has been made.

The Ferries Company presented its petition to the Court of Claims, in which, after setting out tabulations of differing values, it averred that for numerous reasons the appraisal which had been made was not in accord with the contract, was null and void, was not binding upon it, and constituted a fraud upon its rights (Paragraphs 9–17, R. 9–11). It further averred that its property had been taken by the United States, and that it was entitled to receive from the United States "just compensation," which was $343,702.16. (Paragraph 18, R. 11.) The petition concluded with the following prayer:

> Whereof, your petitioner further states that the action of said appraisers as contained in said "Majority Report" be set aside and declared null and void for the reason hereinabove set forth, and that this honorable Court inquire into and fix the value of the property of your petitioner taken by the United States of America, as aforesaid, and render judgment against the United States of America for the value thereof, which your petitioner claims

is the said sum of Three Hundred and Forty-three Thousand Seven Hundred and Two and Sixteen Hundredths ($343,702.16) Dollars, with interest thereon from the thirty-first day of October, 1918, until paid.

The principal question here involved is whether the Court of Claims had jurisdiction of this cause of action.

ARGUMENT

I

The Court of Claims had no jurisdiction of the cause of action set forth in the claimant's petition

The precise nature of the cause of action upon which the Claimant sought to recover in the Court of Claims does not clearly appear from the petition. Its averments would seem to support equally well two distinct theories: (1) That the Claimant has a right to recover at law upon an implied contract on the part of the United States to pay "just compensation" or "fair value" for property of the Claimant taken by it and appropriated to public use (See paragraph 18 of the petition, R. 11); and (2) That the Claimant has a right in equity to have the appraisal which was made by a majority of the board of appraisers set aside, and thereupon to have the Court of Claims enter upon and make a new appraisal and thereafter render judgment in favor of the Claimant for the amount found to be due after such appraisal. (See paragraph 20 of the petition, R. 11.)

The Court of Claims was without jurisdiction to entertain the petition upon either of these theories.

1. *As to the action at law.*—We take these propositions to be well settled by the decisions of this Court: That the Court of Claims has jurisdiction under Section 145 of the Judicial Code to hear and determine causes of action based upon contracts express or implied between a claimant and the United States; that a contract will be implied when officers of the United States lawfully empowered so to do, take and appropriate to public use property which they admit belongs to the claimant (*United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645 and 124 U. S. 581; *United States* v. *Lynah*, 188 U. S. 445); that no such contract will be implied, however, and the Court of Claims is without jurisdiction, in cases where the United States enters into possession of property claiming title, or the right of possession under a contract (*Langford* v. *United States*, 101 U S. 341; *Hill* v. *United States*, 149 U. S. 593; *Tempel* v. *United States*, 248 U. S. 121; *Klebe* v. *United States*, 263 U. S. 188); and that if there be a taking of property under a claim of right and no such right in fact exists, the taking is tortious and no action to recover therefor can be maintained in the Court of Claims (*Langford* v. *United States*, 101 U. S. 341).

In the instant case it clearly appears from the petition that the United States acquired the Norfolk County Ferries under the terms of an express contract. Accordingly there was no "taking" and no implied

promise to pay "just compensation" or "fair value," such as would give jurisdiction to the Court of Claims. (*Klebe* v. *United States*, 263 U. S. 188.) If the claim be treated as one based upon an implied contract to pay the fair value of the property, or upon a taking which was unauthorized or unwarranted in law, it was properly dismissed for want of jurisdiction.

2. *As to the action in equity.*—The Court of Claims is not a court of equity and does not have general equitable jurisdiction. (*United States* v. *Jones*, 131 U. S. 1.) It does exercise a very limited equitable jurisdiction, such as is ancillary and necessary to afford full relief in actions *ex contractu*. It may re-form contracts which because of fraud or mutual mistake of fact do not represent the agreement of the parties. (*United States* v. *Milliken Imprinting Co.*, 202 U. S. 168; *Wm. Cramp & Sons* v. *United States*, 216 U. S. 494.) But we know of no case in which its equitable jurisdiction has been held to extend farther.

In the instant case the claimant appeals to the Court of Claims as a court of equity to examine into the making of the appraisal of the ferries property and to find and declare that that appraisal was irregular, not in accord with the terms of the contract, not binding on the claimant, fraudulent, null and void; then to set itself up as a substitute board of appraisers, to examine into the value of the property and ascertain what its true value was on October 31, 1918; and after this has been done, then

to enter judgment in favor of the Claimant for the amount thus found to be due.

Such relief was afforded in a proper case by a court of general equitable jurisdiction in the case of *Low Estate Co.* v. *Lederer Realty Co.*, 35 R. I. 352. Conceding, for the purpose of the argument only, that this is a proper case for such relief, we respectfully submit that the Claimant must seek it in a court of general equitable jurisdiction. The Court of Claims is not such a court.

II

The appraisement made by a majority of the appraisers was valid and binding upon the claimant

If the conclusion of the Court of Claims that it was without jurisdiction to hear and determine the claimant's cause be erroneous, the question then arises whether the report made by a majority of the appraisers should be set aside. We think it is clear that this appraisement is valid and binding upon the claimant.

The parties to the lease submitted the matter of appraisement and valuation to a board of appraisers, from whose findings no right of appeal or review was provided for. In the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise honest judgment, the finding of the board is conclusive upon the parties.

Kihlberg v. *United States*, 97 U. S. 398.
Sweeney v. *United States*, 109 U. S. 618.

Martinsburg & Potomac R. R. Co. v. *March*, 114 U. S. 549.

United States v. *Mason & Hanger Co.*, 260 U. S. 323.

Was there any such fraud, gross mistake, or bad faith in the instant case? Not only are these elements absent, but it seems clear that this appraisement as reported by a majority of the board was properly made, in accordance with the true purpose and intent of the contract, and was valid and binding upon the parties. The Claimant's first contention is that the valuation was improperly made.

The original contract contained the following pertinent provisions (Finding No. III, R. 24):

> Third. That all property turned over to the lessee is to be kept by him in good running order and condition.
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> * * * * *
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> Fourth. * * * and at the termination of the said lease, all the property used and held for the use of, and in connection with, said Ferries, including any boat or boats which may be purchased or built by the lessee for the use of said Ferries, and any improvements made by him shall, before the same is turned over to the City and County, or the succeeding lessee, should there be one, be inventoried and valued by a board of five disinterested persons. * * *

And the contract of October 8, 1918, contained the following pertinent provisions (Finding No. IV, R. 25):

> Second. That the appraisal of the ferries properties so provided for in said lease, shall take place as of the time that the ferries shall be taken over by the Bureau instead of at the regular termination of the said lease, as therein provided, and said appraisal shall be made in the same manner as if the said lease had regularly terminated at the date that the said ferries are taken over by the Bureau, as aforesaid.

It will be noted that while these provisions fix the *time* of the inventory and appraisement, they are silent as to the *method of valuation* which shall be applied. The contracting parties left this to be determined by the appraisers, guided by the spirit and intent of the lease. (Cf. *Low Estate Co.* v. *Lederer Realty Corp.*, 35 R. I. 352, 358—360.) The petition and brief of the Appellant fail to distinguish between the *time* of the inventory and appraisement and the *method of valuation*. The valuation of the ferries as fixed by the majority of the appraisers is a valuation "as of October 31, 1918, when they were turned over by the plaintiff company to the United States." (See second paragraph of Finding No. VIII, R. 27.) The Appellant's real complaint is that a certain method of valuation was not adopted. Let us look at the lease.

The owners turned over to the lessee the ferries property with a specific covenant that the latter should keep it in good order and condition. Other

provisions insured the making of necessary improvements (Paragraph 10, R. 17) and reserved to the owners substantial control over all major additions to the plant. (Paragraph 14, R. 17.) And when the property was returned at the termination of the lease it was to be inventoried and appraised for the obvious purpose of preventing undue gain or loss to either party by reason of the making or failure to make necessary repairs, improvements, or additions to the property. There is nothing in the agreement to indicate an intention that the lessees should be paid at the termination of the lease for an unearned increment arising out of appreciation in value of the owners' property. Nor is there any principle of justice or equity which requires that they should reap a benefit, amounting in this case to about 100%, out of a fortuitous increase in value of assets which did not belong to them. The lease did not contemplate that the owners should be required to buy back their property at the termination of the lease.

In making an appraisement for the purposes of this lease, therefore, the majority of the appraisers were undoubtedly carrying out the spirit and intent of the lease when they rejected the "reproduction cost new less depreciation" basis for valuation. The findings of the Court of Claims do not show precisely what method was adopted. It is said that the valuation "was based upon pre-war conditions and values" (Finding No. VIII, R. 27). We think it a fair inference, however, that the majority of the appraisers adopted an historical method of valuation. This

method gave to the lessee the benefit of all actual additions and improvements made by it, and withheld only the unearned increment to which the lessee had no right or title under the lease. Such an appraisement was not out of keeping with the purpose and intent of the contract, and ought not to be disturbed.

Monidah Trust v. *Arctic Const. Co.*, 264 Fed. 303, 306.

The Appellant further contends that it is not bound by the valuation made because it was not joined in by all five of the appraisers. But the rule as laid down by this Court is opposed to this contention. In *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 192, Mr. Justice Lurton said:

> When a matter of purely private concern is submitted to the determination of either arbitrators or appraisers the rule seems to be that there must be unanimity of conclusion by such board, unless otherwise indicated by the terms of the submission. [Citing cases.] The rule is, however, otherwise when the submission is one which concerns the public. In such submissions, whether it be the arbitration of a difference or the ascertainment of a value, a majority may act, unless otherwise indicated by the agreement for submission.

See also *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 547.

It can not be doubted that the matter here submitted to the appraisers was one of public concern.

The owners of the property to be appraised were two of the municipal divisions of the State of Virginia, and the lease under which the appraisement was made was specifically provided for by an Act of the General Assembly of Virginia (See Exhibit "A" to Petition, R. 12). Aside from any public interest with which the appraisal may have been clothed by reason of the fact that the United States had become the succeeding lessee; the public ownership of the property by the City of Portsmouth and the County of Norfolk brought it clearly within that class of cases which "concern the public."

Finally it is urged that the appraisement must be set aside because some of the members of the board were not "disinterested persons," as required by the terms of the lease. Their alleged interest was due to the fact that they were taxpayers in the City of Portsmouth or the County of Norfolk. The answer to this contention is three-fold: (1) The alleged interest is too remote to disqualify the appraisers; (2) The record does not show that the claimant made any objection to the qualifications of the appraisers until after the valuation had been completed; and (3) The record shows that the claimant itself selected W. W. Colonna, a taxpayer, and that the two appointees of the claimant joined in selecting Cornelius Thomas, also a taxpayer, as the fifth member of the board. In view of these circumstances a court of equity could not sustain such a contention. (See *Morse on Arbitration and Award*, 100 ff.)

We respectfully submit that neither the method of valuation adopted, nor the failure of a minority of the board to concur, nor the alleged interest of the appraisers, constitute a fraud upon the claimant; nor was there such gross mistake as would necessarily imply bad faith or a failure to exercise honest judgment. The appraisement made by the majority is, therefore, binding upon the claimant.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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MAY, 1924.

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